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PD-0831-18

In the Court of Criminal Appeals
of Texas

———♦———

No. 14-17-00098-CR
In the Court of Appeals
For the Fourteenth District of Texas
At Houston

———♦———

No. 2109329
In the County Criminal Court at Law No. 6
Of Harris County, Texas

———♦———

MARC WAKEFIELD DUNHAM
Appellant
V.
THE STATE OF TEXAS
Appellee

———♦———

STATE'S BRIEF ON DISCRETIONARY REVIEW

———♦———

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TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On September 1, 2016, the appellant was charged by information with the misdemeanor offense of deceptive business practices, committed on June 15, 2016. (C.R. – 8). Following a trial, a jury found the appellant guilty of the charged offense on January 27, 2017; the trial court sentenced him to one year in the Harris County Jail. (C.R. – 89-92). On the same day, the appellant timely filed notice of appeal, and the trial court certified the appellant's right to appeal. (C.R. – 94-96).

On direct appeal, the Fourteenth Court of Appeals affirmed the conviction in a published opinion issued on July 10, 2018. *Dunham v. State*, 554 S.W.3d 222 (Tex. App.—Houston [14th Dist.] 2018, pet. granted). The appellant filed no motion for rehearing. This Court granted the appellant's petition for discretionary review on December 5, 2018.

STATEMENT OF FACTS

On June 15, 2016, the appellant rang Eloise Moody's doorbell. (III R.R. – 22-25). He said, "I'm here to update your security," and he gestured to the yard sign by her front door, which bore the name of her alarm company. *Id*. At that time, Moody—81 years old, recently widowed, and on a fixed income—had a contract

with Central Security Group ("Central"). (III R.R. – 25-29). Based on his statements and his gesture, Moody believed that the appellant worked for Central, so she invited him into her home. (III R.R. – 26-27).

Inside Moody's home, the appellant detailed the improvements that he could make to her security system, including a light for her yard sign, a life alert button, a remote control to turn the system on or off, and a new panel. (III R.R. – 24-34). He explained that these features, the new equipment, and the installation would be free. (III R.R. – 29, 31, 61-62). The appellant told her that the technician could install the equipment right away. (III R.R. – 24-31). Eventually, the appellant showed Moody a contract stating that she would be required to pay monthly monitoring; this was the first time Moody realized the appellant worked for a different alarm company, Capital Connect ("Capital"). (III R.R. – 30-36).

Before Moody signed the contract, the technician began cutting out her Central alarm system and replacing it with Capital's system. (III R.R. – 37-38); (State's Ex. 3). Confused and not understanding why the appellant was cutting out her alarm system, Moody agreed to the contract and signed it. (III R.R. – 34-47). Moody said that she would not have let the appellant in her home had she known he worked for a different alarm company. (III R.R. – 34).

Several days after the appellant entered Moody's home, her daughter helped her cancel the Capital contract. (III RR. – 34-36, 51-57). Capital's features had not

even worked for Moody because she did have internet, a fact she had shared with the appellant at the time of his house call. (III R.R. – 34-36, 51-57). Because the appellant had carved Moody's old system out of her wall, her daughter had to help her set up a yet another alarm contract. (III R.R. – 58, 91, 97-8). And the result of the appellant's "update" was a contract costing Moody more than her original contract with Central. *Id*.

Deputy Brisa Rodriguez of the Precinct Five Harris County Constable's Office later responded to Moody's call for service. (III RR. – 156-76). She learned how Moody had been deceived by the appellant. *Id*. And she discovered that Moody was not the appellant's only victim—the appellant used similar tactics to sell the Capital system to other people around the same time and in the same neighborhood. (III R.R. – 164); (IV RR. – 11-58, 64-88).

REPLY TO APPELLANT'S FIRST ISSUE

In his first issue, the appellant urges this Court to reconsider the sufficiency of the evidence. (Appellant's Brief at 9). Specifically, the appellant maintains that the court of appeals erred because no evidence of an affirmative misrepresentation—only an omission—by the appellant supported its ruling. *Id*. Additionally, the appellant complains that Moody "accurately understood" the terms of the transaction when it occurred. *Id*. But the evidence showed that the appellant made overt,

physical misrepresentations in addition to calculated omissions. And nowhere does the statute restrict the timing of the offense to that moment when a contract was signed or a transaction completed. The evidence is therefore sufficient to support the conviction, and the ruling by the court of appeals was not in error.

A. Standard of review for the sufficiency of the evidence

The standard of review in the present case is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found beyond a reasonable doubt the elements of the charged offense. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury, as factfinder, judges the credibility of witnesses and may find credible all, some, or none of the testimony it hears. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). It is the duty of the jury "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

It has long been settled in Texas courts that the testimony of one witness, if believed beyond a reasonable doubt, is sufficient to support a fact. *See Palmer v. State*, 244 S.W. 513, 513 (Tex. Crim. App. 1922) (stating "one-witness rule"). A defendant's criminal culpability may be proven by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009). And intent may be "inferred

from the acts, words, and conduct of the accused." *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995).

Where a sufficiency review involves the meaning of undefined statutory terms, those terms should be "understood as ordinary use allows, and jurors may thus freely read statutory language to have any meaning which is acceptable in common parlance." *Clinton v. State*, 354 S.W.3d 795, 800 (Tex. Crim. App. 2011) (quoting *Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992)). The information in the present case alleged as follows:

> [I]n Harris County, Texas, MARC WAKEFIELD DUNHAM, hereafter styled the Defendant, heretofore on or about JUNE 15, 2016, did then and there unlawfully, in the course of business intentionally, knowingly and recklessly represent that a commodity or service is of a particular style, grade, or model if it was another, namely: by giving the impression to . . . the Complainant that an alarm system was a Central Security Group alarm system when it was actually a Capital Connect alarm system, and/or intentionally, knowingly and recklessly represent the price of property or service falsely or in a way tending to mislead, namely by telling the Complainant that a new alarm system installation would be free when such installation actually would require her to sign a new contract at additional cost, and/or intentionally, knowingly and recklessly make a materially false or misleading statement in connection with the purchase or sale of property or service, namely, by telling the Complainant that a new alarm system installation would be free when such installation actually would require her to sign a new contract at additional cost.

(C.R. – 8). In pertinent part, the statute applicable in the present case provides:

> (b) A person commits an offense if in the course of business he intentionally, knowingly, recklessly, or with criminal negligence commits one or more of the following deceptive business practices:

. . . .

(7) representing that a commodity or service is of a particular style, grade, or model if it is of another;

. . . .

(9) representing the price of property or service falsely or in a way tending to mislead;

. . . . or

(12) making a materially false or misleading statement:

. . . .

(A) in an advertisement for the purchase or sale of property or service; or

(B) otherwise in connection with the purchase or sale of property or service.

TEX. PENAL CODE § 32.42(b). The definition of "business" includes "trade and commerce and advertising, selling, and buying service or property." *Id*. § 32.42(a)(2).

B. Rational jurors could have found beyond a reasonable doubt that the appellant committed deceptive business practices based not only on omissions but also on his actions.

In his brief on discretionary review, the appellant contends that the appellant "did not make any affirmative misrepresentation." (Appellant's Brief at 11) (emphasis omitted). He also alleges that "the State's theory of liability was based improperly on a reckless omission rather than an act," and that the "appellant did not act recklessly in any event." (Appellant's Brief at 16) (emphasis omitted). But in its opinion, the court of appeals cited evidence of the appellant's actions upon which jurors could have relied when they found the appellant guilty of the charged offense. *Dunham*, 554 S.W.3d at 227-30. That evidence demonstrated affirmative acts and

provided facts from which jurors could have inferred the appellant's intent. *See Patrick*, 906 S.W.2d at 487 (holding that intent may be "inferred from the acts, words, and conduct of the accused.").

The appellant focuses his analysis on whether any evidence in the record supported the position of the State and the court of appeals—that the appellant represented that his alarm system was of a particular style, grade, or model when it was of another. (Appellant's Brief at 11-14). In arguing that the evidence was insufficient, the appellant "neither alleged nor proved any words or conduct by appellant to Moody presenting as a fact that he would install a Central system." (Appellant's Brief at 13) (quotation omitted). But, as the court of appeals noted, the appellant told Moody he was there to "update [her] security[,]" and "[a] rational inference from this statement and conduct is that appellant was describing a Central alarm system, although he was not." *Dunham*, 554 S.W.3d at 227-29.

When the appellant told Moody about the "update," the court noted, he even pointed to the Central sign. *Id*. at 229. While the appellant may not have explicitly told Moody that he was from Central, a jury was free to conclude from his actions that he misrepresented himself and his product. *See, e.g., Balderas v. State*, 517 S.W.3d 756, 766 (Tex. Crim. App. 2016) (holding reviewing courts must defer to jury's rational inferences and resolution of conflicting inferences supported by record). At the very least, the appellant's actions also showed that he acted

recklessly when he gestured to the Central sign and failed to identify himself. *See Dunham*, 554 S.W.3d at 230 (referencing *Balderas*, 517 S.W.3d at 766).

Given the evidence offered by Andrew Davis and James Zike, a rational jury could have also inferred that the appellant's deceitful behavior was blatant and intentional. Both Davis and Zike testified to their experiences with the appellant, who was vague with them about his employer and true purpose for being at their home until he got inside their houses. (IV R.R. – 12-20, 34, 66-79). In Zike's case, the appellant referenced Zike's ADT yard sign and did not correct Zike when Zike introduced the appellant to his wife as an ADT employee. (IV R.R. – 66-67, 79).

And while the court of appeals addressed only the first alleged manner and means, the evidence adduced at trial was similarly sufficient to establish the second and third manner and means. The appellant acted recklessly in falsely representing the price of the service or made materially false or misleading statements in connection with the purchase of a service by telling Moody that the installation would be free, when it actually required her to sign a new contract at additional cost. (C.R. – 8); *See* TEX. PENAL CODE § 32.42(b)(9); TEX. PENAL CODE § 32.42(b)(12)(B). The record shows that the appellant repeatedly told Moody that upgrading her system would be free. (III R.R. – 25-30, 46, 61).

The appellant said that Moody would get a wireless system, a life-alert button, a remote, and installation for free. (III R.R. – 25-30, 61). The wireless system was

particularly useless to Moody as she did not have internet service—a fact of which she had made the appellant aware. (III R.R. – 34-36). In total, these "free" services, which required a new contract with Capital, would cost Moody about $25 more per month than she had been paying with Central. (III R.R. – 30-32, 44, 61); (State's Ex. 1-2, 5).

The appellant argues that "any misunderstanding that Moody initially had about whether appellant worked for Central could not form the basis of a conviction for deceptive business practice where she had a full and accurate understanding of the terms of sale at the time of the commercial transaction." (Appellant's Brief at 21). But the at-issue statute and the charging instrument in this case addressed practices in the "course of business," not merely at the moment a card is swiped or pen is put to paper. *See* TEX. PENAL CODE § 32.42(b). The court of appeals addressed this distinction, noting that "[t]he relevant inquiry does not focus on what the complainant knew at the time she signed the contract; instead, it focuses on what appellant did—what he represented—during the course of business." *Dunham*, 554 S.W.3d at 229 (citing TEX. PENAL CODE § 32.42).

In this case, the appellant approached the home of a newly-widowed octogenarian on a fixed income. (III R.R. – 25-29). Rather than clearly identifying his employer and purpose to her, he deceived her by gesturing to the Central sign in her yard and telling her he was there to "update," not replace or even upgrade, her

security. (III R.R. – 22-29). His deception earned him entry into her home just as it had allowed him to enter the homes of others before her. (III R.R. – 24-34); (IV R.R. – 12-20, 34, 66-79).

Not until the appellant presented her with a contract did Moody realize that the appellant did not work for her alarm company. (III R.R. – 30-36). And before she signed the contract, the appellant had already begun cutting out her Central system and replacing it with the Capital one he had come to her house to sell. (III R.R. – 37-38); (State's Ex. 3). Confused, she agreed to the contract and signed it. (III R.R. – 34-47). She testified that she would not have let the appellant into her home had she known he did not work for her alarm company. (III R.R. – 34). The evidence in this case is sufficient to support the appellant's conviction; the appellant's first issue should therefore be overruled.

REPLY TO APPELLANT'S SECOND ISSUE

In his second issue, the appellant asks this Court to revisit the jury charge in this case and the ruling on it by the court of appeals. (Appellant's Brief at 23-25). Specifically, the appellant argues that "deceptive business practice is a 'nature-of-conduct' offense instead of a 'circumstance-of-conduct' offense," and that the trial court therefore erred by failing to require the jury to unanimously agree "that the defendant committed the same specific act" in order to convict him of the offense.

(Appellant's Brief at 23). But the ruling by the court of appeals is in accordance with the logic of this Court's opinion in *O'Brien v. State*, 544 S.W.3d 376 (Tex. Crim. App. 2018). The appellant's second issue should therefore be overruled.

A. Standard of review for claims of jury charge error

When reviewing a claim of error related to the court's charge, appellate courts first determine whether the trial court committed any error. *Tolbert v. State*, 306 S.W.3d 776, 779 (Tex. Crim. App. 2010). Only after finding that the trial court erred does a reviewing court look to whether the harm is sufficient to require reversal. *Id.* The appellant must have suffered some actual, not theoretical, harm. *Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986).

Where the appellant preserved the error, appellate courts must decide whether that error caused "some harm." *Almanza v. State*, 686 S.W.2d 157, 160-74 (Tex. Crim. App. 1985) (op. on reh'g); *Rodriguez v. State*, 524 S.W.3d 389, 391 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). In the harm analysis, a reviewing court considers (1) the arguments of counsel, (2) the jury charge as a whole, (3) the entirety of the evidence, and (4) any other relevant factors. *Rodriguez*, 524 S.W.3d at 391 (citing *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013)).

B. In determining that deceptive business practices is a circumstances-of-conduct offense, the court of appeals properly applied the reasoning of this Court in *O'Brien*; the

trial court therefore did not err by refusing the appellant's request for a jury charge requiring unanimity as to the manner and means.

The appellant in this case was charged by information for a single offense of deceptive business practices, and the State alleged that he committed that offense in three alternative ways. (C.R. – 8, 87-88).[1] During the charge conference, the appellant requested that the jury be charged that they had to be unanimous regarding the manner and means. (IV R.R. – 104-08). The trial court denied the appellant's request. (IV R.R. – 108). The jury was charged by the trial court regarding these alternative manner and means in the disjunctive and instructed that they need not be unanimous regarding the manner and means. (C.R. – 87-88). Therefore, the jury was instructed that it could convict the appellant of deceptive business practices by any of the three alleged manners and means. *Id*.

A unanimous verdict is required in all cases. *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005). A jury is required to be unanimous on the essential elements of an offense. *Jefferson v. State*, 189 S.W.3d 305, 311 (Tex. Crim. App. 2006) (internal citations omitted). But where "the statute in question establishes different modes or means by which the offense may be committed, unanimity is generally not required on the alternate modes or means of commission." *Id*.

[1] The pertinent portion of the charging instrument is quoted above on page ten of this brief.

To determine the essential elements of an offense for unanimity purposes, courts generally turn to the so-called "grammar test" laid out in *Leza v. State*, 351 S.W.3d 344, 356-57 (Tex. Crim. App. 2011); *see O'Brien*, 544 S.W.3d at 386 (discussing the "eight-grade-grammar-test"). In *Leza*, this Court indicated that "[t]he essential elements of an offense are, at a minimum: (1) the subject (the defendant); (2) the main verb; (3) the direct object if the main verb requires a direct object (i.e., the offense is a result-oriented crime); the specific occasion, and the requisite mental state." *Id*. at 356-57.

Additionally, courts look to the gravamen or focus of the offense to determine what jurors must be unanimous about. *See Young v. State*, 341 S.W.3d 417, 423 (Tex. Crim. App. 2011); *see also Leza*, 351 S.W.3d at 357 (noting that grammar test "will not necessarily work invariably, in every scenario, to accurately identify legislative intent."). There are three general categories of criminal offenses: "result of conduct," "nature of conduct," and "circumstances of conduct." *See Young*, 341 S.W.3d at 423-24. And courts look to the statutory language to determine, which category the crime falls under. *Id*.

Under the first category, "result of conduct," a jury generally must be unanimous only about the result, not the different acts committed that caused such result (i.e. murder). *Id*. And a jury must be unanimous about the specific result of the conduct. *Id*. at 424. "Nature of conduct" offenses, on the other hand, usually

have different verbs in different sections, indicating the intent to punish different types of conduct. *Id*. Thus, the jury must be unanimous about the specific criminal act. *Id*.

Finally, with a "circumstances surrounding the conduct" offense "the focus is on the particular circumstances that exist rather than the discrete, and perhaps different, acts that the defendant might commit under those circumstances." *Id*. Thus, a "circumstances surrounding the conduct" offense requires a jury to be unanimous about the existence of the particular circumstance that transforms an otherwise innocent act into a criminal one. Regardless, the concept remains the same: Is the gravamen or focus of the offense "the result of the act, the nature of the act itself, or the circumstances surrounding that act?" *Id*.

Section 32.42(b) of the Texas Penal Code enumerates twelve different actions which constitute deceptive business practices, either separately or in combination. TEX. PENAL CODE § 32.42(b). The statute provides that:

> A person commits an offense if in the course of business he intentionally, knowingly, recklessly, or with criminal negligence commits one or more of the following deceptive business practices:
>
> > (1) using, selling, or possessing for use or sale a false weight or measure, or any other device for falsely determining or recording any quality or quantity;
> >
> > (2) selling less than the represented quantity of a property or service;

> (3) taking more than the represented quantity of property or service when as a buyer the actor furnishes the weight or measure;
>
> (4) selling an adulterated or mislabeled commodity;
>
> (5) passing off property or service as that of another;
>
> (6) representing that a commodity is original or new if it is deteriorated, altered, rebuilt, reconditioned, reclaimed, used, or secondhand;
>
> (7) representing that a commodity or service is of a particular style, grade, or model if it is of another;
>
> (8) advertising property or service with intent: (A) not to sell it as advertised, or (B) not to supply reasonably expectable public demand, unless the advertising adequately discloses a time or quantity limit;
>
> (9) representing the price of property or service falsely or in a way tending to mislead;
>
> (10) making a materially false or misleading statement of fact concerning the reason for, existence of, or amount of a price or price reduction;
>
> (11) conducting a deceptive sales contest; or
>
> (12) making a materially false or misleading statement: (A) in an advertisement for the purchase or sale of property or service; or (B) otherwise in connection with the purchase or sale of property or service.

TEX. PENAL CODE § 32.42(b).

Applying the grammar test to section 32.42(b), the subject is "[a] person," the main verb is "commits," the direct object is "one or more of the following deceptive

business practices" (the following being the enumerated offenses), and the requisite mental state is intentionally, knowingly, recklessly, or with criminal negligence. TEX. PENAL CODE § 32.42(b). The phrase "one or more of the following" leaves some uncertainty for purposes of unanimity; however, if the specific enumerated offenses were an essential element of deceptive business practice, then the use of the term "one or more" would be meaningless. *See O'Brien*, 544 S.W.3d at 388.

This phrase distinguishes the statutory language here from language in other statutes like the credit card abuse where the specific enumerated offenses are an essential element, making up the entirety of the statute. *Cf.* TEX. PENAL CODE § 32.31(b); *see also Ngo*, 175 S.W.3d at 745-46. In *Ngo*, this Court found that the enumerated acts constituting credit card abuse were separate, independent offenses rather than a single offense with different manner and means. *Ngo*, 175 S.W.3d at 745-46. Therefore, this Court also found in *Ngo* that the statute required unanimity for each specified act. *Id*.

In the present statute, however, the statutory language is different. The direct object includes the phrase "deceptive business practices" and states that a person commits deceptive business practices if such person engages in "one or more" enumerated actions. TEX. PENAL CODE § 32.42(b). Thus, the statute allows for a single criminal act—committing deceptive business practices—and the enumerated acts describe how the defendant committed the specific statutory criminal act.

Additionally, an offense under section 32.42(b) appears to be a "circumstances of conduct" offense because it requires the defendant to be "in the course of business" while performing one or more of the deceptive acts. *See Young*, 341 S.W.3d at 423-24. Thus, unanimity is only required about the existence of the particular circumstance that makes the otherwise innocent act criminal. *Id*. at 424, 427-28 (finding that failure to report a change of address as a sex offender is a circumstances of conduct offense; holding that jurors must unanimously agree only that a sex offender failed to fulfill his reporting duty, not how he failed that duty specifically).

In the present case, the court of appeals, facing an issue of first impression with regard to deceptive business practices, examined the statute and applied the "eighth-grade-grammar test" recently described by this Court in the context of engaging in organized criminal activity in *O'Brien*, 544 S.W.3d at 386; *Dunham*, 554 S.W.3d at 231. After considering the language of the statute, the court of appeals agreed that it created a circumstances-of-conduct offense, and that a jury is therefore not required to unanimously agree upon which of the "one or more of the following" acts the defendant committed. *Dunham*, 554 S.W.3d at 233.

Jurors in this case were required to be unanimous that the appellant committed a deceptive business practice while in the course of business; they were not required to agree as to how the appellant was deceptive. Accordingly, the trial court did not

err by failing to instruct jurors to be unanimous regarding the specific manner and means. Nor did the court of appeals err in its ruling. The appellant's second issue should therefore be overruled.

CONCLUSION

It is respectfully submitted that all things are regular and the conviction should be affirmed.

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CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that: (a) the word count function of the computer program used to prepare this document reports that there are 4,998 words in it; and (b) the undersigned attorney will request that a copy of the foregoing instrument be served by efile.txcourts.gov to:

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